SIXTEENTH ANNUAL

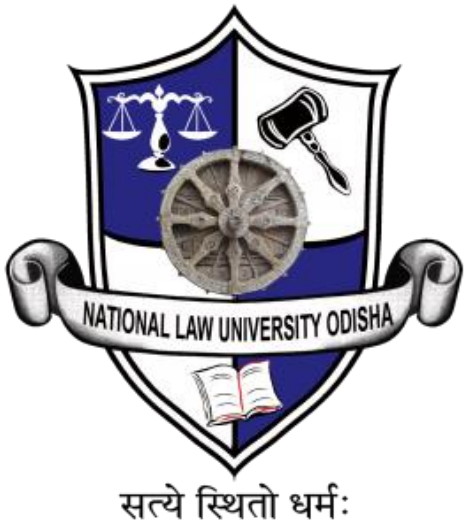
WILLEM C VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong

31st March to 7th April 2019

NATIONAL LAW UNIVERSITY ODISHA



MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana

IN THE ARBITRAL PROCEEDING: HKIAC/A18128

COUNSELS

ASTHA AHUJA * MANASVINI VYAS * PRERONA BANERJEE * SIDDHARTH JAIN

YASASCHANDRA VENKATA SAI DEVARAKONDA

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%	Per cent
&	Ampersand
§(§)	Clause(s)
¶(¶)	Paragraph(s)
A No A	Answer to Notice of Arbitration
ad rem	To the matter
Art.	Article
Au Contraire	On the contrary
au fait	Having knowledge of
BEL	Belgium
BGH	Bundesgerichtshof, Germany
BTTP	Bulgarska Turgosko-Promishlena Palata
BUL	Bulgaria
Catch 22	Dilemma or difficult circumstance from which there is no escape because of a mutually conflicting conclusion
CCIG	Chambre De Commerce, D'industrie Et Des Services De Genève
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nation Convention on International Sale of Goods, 1980
CISG-AC	United Nation Convention on International Sale of

	Goods – Advisory Council
Cl.	Claimant
CLOUT	Case laws on UNCITRAL Text
Co.	Company
Corp.	Corporation
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
Dr.	Doctor
ed.	Editor
edn.	Edition
Ergo	Therefore
ESP	Spain
EU	European Union
Ex.	Exhibit
EXW	Ex Works
GER	Germany
HKIAC	Hong Kong International Arbitration Centre
i.e.,	Id est (that is)
IBA	International Bar Association
ibid.	ibidem
ICAC	International Commercial Arbitration Court

ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
In arguendo	In alternative
In casu	In the case at hand
Iss.	Issue
ITL	Italy
LCIA	London Court of International Arbitration
lex arbitri	Law of the seat of the arbitration
LLP	Limited Liability Partnership
Ltd.	Limited
Memo	Memorandum
NAFTA	North Atlantic Free Trade Agreement
No A	Notice of Arbitration
No.	Number
Ors.	Others
p(p).	Page(s)
PECL	Principles on European Contract Law
Per Contra	On the other hand,
PO	Procedural Order
Prof.	Professor

Resp.	Respondent
SCT	Scotland
Sec.	Section
SG	Secretary General
SIAC	Singapore International Arbitration Centre
SNG	Singapore
Sub.	Submission
SUI	Switzerland
U.S.	United States of America
UCCT	Ukraine Chamber of Commerce and Trade
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nation
UNCITRAL	United Nation Commission on International Trade Law
UNIDROIT	Institut international pour l'unification du droit privé
UPICC	UNIDROIT Principles on International Commercial Contracts
USD	United States Dollar
v.	Versus (against)
Vol.	Volume
WTO	World trade Organisation

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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**", collectively "**the Parties**"). CLAIMANT operates a stud farm in Mediterraneo. RESPONDENT, located in Equatoriana, is famous for its broodmare and it decided to expand into racehorse breeding.

21 MAR 2017	RESPONDENT contacted CLAIMANT inquiring about the availability of its star stallion, Nijinsky III, for its newly started racehorse breeding programme.
24 MAR 2017	CLAIMANT offered to sell 100 doses of Nijinsky III's frozen semen in accordance with its general terms and conditions.
28 MAR 2017	RESPONDENT accepted all terms of the offer except the choice of law and forum selection clause and insisted on delivery DDP.
31 MAR 2017	The change in delivery terms was accepted by CLAIMANT on the transfer of certain obligations to RESPONDENT and inclusion of a hardship reference.
10 APR 2017	RESPONDENT prepared the first draft of the arbitration clause which provided for the seat of arbitration to be Equatoriana and for its law to extend to the clause. It also suggested a narrowed version of the HKIAC Model Arbitration Clause ("**HKIAC Model Clause**")
11 APR 2017	CLAIMANT changed the seat of arbitration to Danubia and raised no objections concerning the law of the seat extending to the arbitration clause or the streamlining of the HKIAC Model Clause.
06 MAY 2017	Frozen Semen Sales Agreement was concluded between the Parties ("**Contract**"). The Contract was governed by the law of Mediterraneo including the United Nation Convention on Contracts for International Sale of Goods, 1980 ("**CISG**"). It also included a hardship reference in the force majeure clause ("**§12**") exempting CLAIMANT from risks of changes in health and safety requirements, The Contract contained an arbitration clause providing for arbitration in Danubia with an implied understanding that its law would extend to this clause. Further, the Parties agreed on the application of the Hong Kong International Arbitration Centre Rules ("**HKIAC Rules**").
15 NOV 2017	As anticipated, a tariff of 25% on all agricultural products from Equatoriana was imposed by the executive order of the new President of Mediterraneo.
19 DEC 2017	The Government of Equatoriana announced the imposition of a retaliatory tariff of 30% on all agricultural goods from Mediterraneo including frozen horse semen.

20 JAN 2018	CLAIMANT found out about the imposition of the tariff on horse semen.
12 FEB 2018	On CLAIMANT's request, RESPONDENT scheduled a meeting to address CLAIMANT's grievances. However, owing to CLAIMANT's demand for extra-contractual remedies, the Parties could not come to a consensus.
31 JUN 2018	CLAIMANT initiated the present arbitration pursuant to Art. 4 HKIAC Rules.
2 OCT 2018	CLAIMANT informed the Arbitral Tribunal ("**Tribunal**") about another arbitration in which RESPONDENT is involved.
3 OCT 2018	Appalled by CLAIMANT's letter to the Tribunal wanting to admit evidence inconsequential to this proceeding, RESPONDENT sent a mail where it resisted admission of the material and pointed out the indiscretions of CLAIMANT in acquiring such evidence.

INTRODUCTION

'It can be challenging to identify a horse from the back because they are always switching their tails'

Needless to say, entering into the Contract was much like betting on the wrong horse. CLAIMANT's incessant demands and heedless self-interest doomed the relationship both Parties' envisioned. The Parties desired a long-term relationship that would be mutually beneficial. Yet, CLAIMANT seems to have missed the memo on what goes into such an alliance. Even after RESPONDENT put up with their stipulations concerning the hardship clause, choice of law clause and the seat, CLAIMANT had the impudence to demand for adaptation. Its request blatantly disregards the Contract's inherent principle of risk-sharing and burdened RESPONDENT with much more than what it signed up for. Better late than never, RESPONDENT realised that a house built on greed could not be endured and it would be impossible to fulfil relentless additional requests. So much for crying out loud, CLAIMANT now wants to take refuge with the Tribunal and legitimise its demands that find no basis in the Contract.

In response to Procedural Order No. 1, Part III, and with regard to the present facts, RESPONDENT submits that the law of Danubia governs the arbitration agreement. Further, that the Tribunal does not have the requisite jurisdiction **(ISSUE 1)**. Moreover, CLAIMANT should not be permitted to submit into evidence an award that has been acquired through wrongdoing **(ISSUE 2)**. Even if the Tribunal holds that it has the power to preside over the present proceedings, it is submitted that CLAIMANT is not entitled to adaptation of price under the Contract or through the CISG **(ISSUE 3)**.

ARGUMENTS

PART ONE. ARGUMENTS REGARDING THE JURISDICTION OF THE TRIBUNAL AND THE ADMISSIBILITY OF THE EVIDENCE

ISSUE 1. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. RESPONDENT submits that the Arbitral Tribunal is not competent to hear the present claim of adaptation. By requesting for the same, CLAIMANT not only attempts to go beyond the contractual agreement but also tries to pass the buck on to RESPONDENT. Regarding the question of jurisdiction, the Tribunal is requested to find that *first*, the Danubian law applies to the arbitration agreement and its interpretation **(I)** and *second*, it is not vested with the powers to adapt **(II)**.

I. THE LAW OF DANUBIA APPLIES TO THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

2. Danubia, the seat of the arbitration, has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments ("**Danubian Arbitration Law**") [*PO 1, p.51 III (4)*]. Thus, it applies as *lex loci arbitri* in the present proceedings [*Born I, p.1531; Redfern/Hunter,* ¶*3.53*]. Under the Danubian Arbitration Law, the law of the Contract does not automatically extend to the arbitration agreement **(A)**. The Parties have implicitly agreed on the application of the law of the seat to the arbitration agreement **(B)**. In any event, the law of the seat should apply as it is most closely connected to the arbitration agreement **(C)** and its application alone ensures a valid and enforceable award **(D)**. On the application of the law of Danubia to the arbitration agreement, its contract law becomes relevant. Since the Danubian contract law adheres to the four corners rule which excludes all extraneous evidence for interpretation of contracts, RESPONDENT's submissions are in accordance with it. However, since CLAIMANT has relied on the drafting history and negotiations to misguide the Tribunal, RESPONDENT is forced to make an alternative submission by relying on the same **(E)**.

A. THE LAW OF THE CONTRACT DOES NOT AUTOMATICALLY EXTEND TO THE ARBITRATION AGREEMENT

3. CLAIMANT argues that after intense negotiations concerning the law applicable to the Contract, the Parties agreed that the same extends to the arbitration agreement [*Cl. Memo,* ¶*24*]. To prove that there was an agreement between the Parties, CLAIMANT has relied on correspondence from April 2017 [*Cl. Ex. 2, 3, 4*]. However, RESPONDENT contends that such negotiations cannot be resorted to understand the intention of the Parties which can be gathered only from the Contract. Even if the negotiations are considered, the Parties did not have an explicit or implicit agreement

to this effect. Further, RESPONDENT submits that by virtue of the doctrine of separability, the law of the contract cannot automatically extend to the arbitration agreement [*ICC 4381; ICC 4504; ICC 5065; Berger I, p.158; Blessing I; Jarvin, p.980; Klaus, p.131; Van den Berg I, p.1027*]. The law of the arbitration agreement was first discussed on 10th April 2017 and all earlier negotiations pertained only to the law governing the Contract [*Resp. Ex. 1*].

4. CLAIMANT argues that the doctrine of separability operates in a restrictive manner guaranteeing only the validity of the arbitration agreement if the main contract is considered invalid [*Cl. Memo, ¶34*]. However, such an understanding is incomplete as the doctrine of separability has a second and an equally pertinent consequence which is recognised by the Danubian Arbitration Law [*Art. 16 DAL; Born I, p.466*]. This doctrine also treats the arbitration clause as separate from the main contract and allows for different laws to govern them. [*ICC 8938; Petersons Farms Case; Born I, p.466; Mayer, p.267*]. In this regard, Prof. Piero Bernardini has opined that *'the autonomy of the arbitration clause is an obstacle'* to have the law of the contract extends to the arbitration agreement [*Bernardini, p.201*]. Thus, the choice in favour of the law of Mediterraneo as the law of the Contract cannot be interpreted as an implied choice for the law of the arbitration agreement. On the other hand, there is consistent jurisprudence that the law of the seat is the default choice of law as it is the proper law of the arbitration agreement [*Jarvin, pp.475-476; Van den Berg III, p.753*].

5. In sum, the law of the Contract does not automatically extend to the arbitration agreement.

B. THE PARTIES HAVE IMPLICITLY AGREED ON THE APPLICATION OF THE LAW OF THE SEAT TO THE ARBITRATION AGREEMENT

6. The Parties agreed on Danubia as the seat of the arbitration because it is a distinct and neutral system of law. Such a choice demonstrates their intention to have even-handed proceedings and uniformity in the procedural system. Since it is only the law of Danubia that ensures both neutrality **(1)** and consistency **(2)**, the Parties can be said to have implicitly chosen it to govern the arbitration agreement. Any other conclusion derived by CLAIMANT that contradicts the intention of the Parties as reflected in the wording of the clause [*Cl. Memo, ¶¶20-24*], is inadmissible due to the application of the four corners rule to the arbitration agreement [*PO 2, ¶45*].

1. THE LAW OF THE SEAT ENSURES NEUTRALITY IN THE ARBITRAL PROCESS

7. Commercial parties choose different systems of law to govern various facets of their relationship [*Amicorum, ¶¶139, 140*]. It is a folly to assume that the system of law which governs the parties' substantive relationship, will also govern the arbitration clause that comes into play only when that relationship breaks down [*ICC 3380; Bernardini, p.201; Mayer, p.267*]. Thus, the natural inference is that different laws govern these two distinct relationships [*Schlosser, p.264; Van den Berg II, p.293*].

8. While choosing a distinct law to govern the arbitration clause, parties desire for impartiality and

thus, accord primacy to the law of the neutral seat [*FirstLink Case; Amicorum, ¶145; Fouchard, p.223*]. This is because, in international contracts, parties hail from different countries and a neutral seat offers procedural fairness and equal treatment of the parties [*Bellet, ¶17; Born II, p.2061; Fouchard, p.235; Moses, p.161; Redfern/Hunter, ¶¶1.99, 1.100*]. Therefore, while the substantive law is limited to the merits of the dispute, there is an implied choice in favour of the law of the seat to govern the arbitration agreement [*FirstLink Case*; *C v. D*; *Amicorum, ¶¶145, 146*].

9. In the present case, the Parties agreed on Danubia as the seat of the arbitration because it is a neutral place, offering no competitive advantage to either of them [*Cl. Ex. 5, §15*]. This selection of the seat showcases an implicit acceptance of having the arbitration agreement be governed by such a neutral system of law. Notwithstanding, CLAIMANT has argued that the law of Mediterraneo extends to the arbitration agreement [*Cl. Memo, ¶36*]. If the same were true, it would gain an unfair advantage over RESPONDENT. In fact, no reasonable party who has consciously agreed on a neutral system of law to counter the possibility of procedural imbalance, would have ever agreed on such a proposition. In this factual matrix, CLAIMANT, hailing from Mediterraneo, would have superior knowledge of its laws and experience in arbitral practice [*Simoes, p.59*]. Since this is contrary to what the Parties or any reasonable person would have intended, it can be deduced that there is an implied choice in favour of the law of seat to govern the arbitration agreement.
10. For the foregoing reasons, RESPONDENT submits that the Parties chose the Danubian law to govern the arbitration agreement and its interpretation.

2. THE LAW OF THE SEAT ENSURES CONSISTENCY IN THE ARBITRAL PROCESS

11. When parties exercise their right to choose a seat, they also accept the application of its law to govern the arbitration [*Moses, p.43; Redfern/Hunter, ¶3.2*]. Indeed, in such circumstances, it is entirely conceivable that parties would demand that such law govern the arbitration agreement to harmonize the arbitral process [*Epping, p.52; Schlosser, p.264*]. Therefore, most parties desire that there is consistency between the law governing the arbitration agreement and the law governing the procedure. Pursuant to *FirstLink Investments v. GT Payments*, harmonizing the law of the seat and the arbitration agreement is a reason compelling enough to find that the Parties impliedly chose the law of the seat to govern the arbitration agreement [*FirstLink Case, ¶16*].
12. *In casu*, the fact that the Parties chose a seat of arbitration that is outside the substantive place of contractual law, manifests a clear intention to differentiate between their substantive and procedural obligations [*Philippine Case*]. Thus, this deliberate choice to have an arbitration in a neutral country, suggests that the Parties did not want the law of Mediterraneo to govern the arbitration agreement. Instead, a cogent understanding would be that they wanted the arbitration agreement to be governed by the law of the seat.

13. In sum, there was an implied choice in favour of the law of the seat.

C. IN ANY EVENT, THE LAW OF THE SEAT SHOULD APPLY AS IT IS MOST CLOSELY CONNECTED TO THE ARBITRATION AGREEMENT

14. CLAIMANT contends that the law of Mediterraneo applies to the arbitration agreement under the closest connection test [*Cl. Memo, ¶26*]. This test seeks to find the applicable law by taking into consideration objective factors that are closely connected to the contract [*Berger II, p.173; Petrochilos, p.221; Sindler, p.619*; *Arroyo, ¶¶221-223*]. CLAIMANT argues in favour of the application of the Mediterranean law using place of accomplishment as a connecting factor [*Cl. Memo, ¶28*]. However, RESPONDENT submits that the Parties desired a neutral process of adjudication and the application of this mechanical connecting factor will veritably negate their expectations [*Resp. Sub. ¶7*].

15. Over and above, RESPONDENT contends that it is the law of the seat which has the closest and most real connection to the arbitration agreement [*FirstLink Case*; *C v. D; Habas Sinai; Lee, p.149*]. This is based on the fact that parties to a dispute discharge their obligation to arbitrate at the legal place of procedure, which is the seat [*Berger III, p.2*]. This performance of the arbitration agreement at the seat makes it an '*overwhelming and primary*' connecting factor in determining the applicable law [*Greenberg, p.161; Klaus, p.131*]. The seat of arbitration has been held to be the '*juridical centre of gravity which gives life and effect to an arbitration agreement*' [*FirstLink Case*]. Accordingly, it is the law of the seat that should apply to the arbitration agreement.

16. In sum, the Danubian law is most closely connected to the arbitration agreement.

D. THE APPLICATION OF THE LAW OF THE SEAT ALONE ENSURES A VALID AND ENFORCEABLE AWARD

17. CLAIMANT asserts that the law of Mediterraneo is the most suitable as it confers the Tribunal with the jurisdiction to adjudicate the present dispute [*Cl. Memo, ¶30*]. To the contrary, RESPONDENT submits that if the Tribunal were to find that there is no implied choice, it is the law of the seat that will be upheld through the validation principle.

18. This principle tips the scales in favour of the law that validates the agreement by removing the law that invalidates it [*ICC 11869; ICC 7154; ICC 5485; ICC 6162; Mustill, p.63; Nazzini, pp.700-701; Pearson*, *p.120*]. The rationale behind this principle is that reasonable businessmen commonly intend for the award rendered to be binding and enforceable [*Amicorum, ¶394*; *Talisker v. Hamlyn*, *¶215*]. In the present case, the Danubian Arbitration Law endows importance to the law of the seat of arbitration, when parties fail to make an express or implied choice of law [*Art. 34(2)(a)(i); Art. 36(1)(a)(i) DAL*]. Under this law, an award can be set aside if the Tribunal does not subject the arbitration to the law of the seat, in the absence of a choice by the Parties [*ibid.*]. Accordingly, the law of Danubia should be applied to the arbitration agreement to ensure that the Tribunal

renders a valid award.

19. In sum, the Tribunal should apply the law of the seat in pursuance of the validation approach.

E. EVEN IF THE FOUR CORNERS RULE IS DISREGARDED, THE DRAFTING HISTORY AND NEGOTIATIONS POINT TO THE APPLICATION OF THE LAW OF THE SEAT

20. Even if, for the sake of arguments alone, the four corners rule is ignored, CLAIMANT seems to have craftily misrepresented the last part of the Contract negotiation and has drawn completely wrong legal conclusions. Its description of the facts portrays a distorted version of the drafting history, misleading the Tribunal. RESPONDENT maintains that the Danubian law adheres to the four corners' rule for the interpretation of arbitration agreements, which bars reliance on all extraneous evidence including the drafting history [*PO 1, ¶II*]. At the same time, it is necessary that this Tribunal is apprised of the complete facts and is not misled by CLAIMANT.
21. To prove its claim that the law of the Contract extends to the arbitration agreement, CLAIMANT relies heavily on the correspondence from April 2017. It has argued that mere opting out of the jurisdiction of Equatoriana was akin to agreeing on the jurisdiction of Mediterraneo [*Cl. Memo, ¶21*]. Relying on the same correspondence, RESPONDENT seeks to prove to the contrary.
22. On 10th April, RESPONDENT sent a draft arbitration clause which provided for an explicit choice in favour of Equatoriana as the law of the seat and the law governing the arbitration agreement [*Resp. Ex. 1*]. At the same time, it maintained that the law applicable to the Contract remained that of Mediterraneo, drawing a clear distinction between the law applicable to the sales agreement and to the arbitration agreement [*ibid.*]. Further, RESPONDENT provided CLAIMANT with an opportunity to raise objections concerning the draft arbitration clause [*ibid.*]. Owing to internal policy considerations, CLAIMANT pointed out its reservations to the Contract being governed by a foreign law and the place of arbitration in the country of the counterparty [*Resp. Ex. 2*]. Since the Contract, in any case, was governed by the law of Mediterraneo, CLAIMANT proposed a change in the place of arbitration. Concomitantly, no objections were raised concerning the application of law of the seat to the arbitration clause [*ibid.*]. Thereafter, CLAIMANT redrafted the clause so that it '*in its relevant part*' reflected Danubia as the place of arbitration [*ibid.*]. This neutral place of arbitration inevitably meant that the choice of law provision would change accordingly. Thus, the arbitration agreement is governed by the law of Danubia.
23. This conclusion is further corroborated by the fact that not only did CLAIMANT not object to the law of the seat governing the arbitration agreement [*Resp. Ex. 2*], but also did not attempt to clarify the same in the final agreement. This proves that there was an implied choice towards the application of the law of the seat to the arbitration agreement.
24. To conclude our submission, RESPONDENT requests the Tribunal to find that the law of Danubia

applies to the arbitration agreement and its interpretation.

II. THE TRIBUNAL IS NOT VESTED WITH THE POWERS TO ADAPT THE CONTRACT

25. Having established that the law of Danubia applies to the arbitration agreement, the Tribunal is bound to apply the four corners rule for its interpretation. In view of this rule, RESPONDENT submits that the Tribunal does not have the requisite power to adapt the Contract **(A)**. Even if external evidence is provisionally admitted, the intention of the Parties to deprive the Tribunal of the power to adapt the Contract is perceptible **(B)**.

A. THE TRIBUNAL DOES NOT DERIVE ITS POWER FROM ANY RELEVANT SOURCE

26. To ascertain the power of an arbitral tribunal to adapt a contract, reference has to be made to three different legal sources: the arbitration agreement, the *lex arbitri* and the substantive law of the contract [*Berger III, p.7*]. RESPONDENT submits that neither the arbitration agreement **(1)** nor the *lex arbitri* **(2)** endows the Tribunal with the power to adapt the Contract. As a result, the Tribunal's power under the substantive law is inconsequential **(3)**.

1. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

27. Contrary to CLAIMANT's assertion [*Cl. Memo, ¶13*], RESPONDENT submits that the arbitration agreement does not vest the Tribunal with the power to adapt the Contract. Arbitral tribunals derive their power to decide on a dispute from the arbitration agreement between the parties [*Berger IV*; *Fouchard, p.28*]. The instant proceedings are based on an arbitration agreement which is governed by the law of Danubia [*Resp. Sub. ¶23*] where tribunals deploy a restrictive approach and bind the parties to the wording of the contract [*McMeel, p.1.44; Orsinger, p.75*].

28. CLAIMANT argues that the four corners rule should be overlooked in view of an exception to the application of the parol evidence rule [*Cl. Memo, ¶40*]. RESPONDENT submits that this argument is flawed as CLAIMANT has misconstrued the four corners rule to be parol evidence rule [*ibid., ¶39*]. However, there exist marked differences between the two rules [*Posner, p.1603*]. The former prohibits the use of any extrinsic evidence, regardless of whether it is supplementary or contradictory to the written contract [*ibid.*]. The latter, on the other hand, only precludes evidence that disproves the written contract [*ibid.*]. Consequently, any exception to the parol evidence rule does not apply to the four corners rule and the interpretation of the arbitration agreement is thus limited to its wording.

29. The arbitration agreement specifies that '*any dispute arising out of this contract*' will be referred to the Tribunal. The Contract was for the shipment of 100 doses of horse semen for USD 10,000,000. CLAIMANT shipped 100 doses for which RESPONDENT fully paid the price. Nevertheless,

CLAIMANT now seeks additional payment for the same doses which cannot be reasonably interpreted to be a '*dispute arising out of*' the Contract. There exists ample jurisprudence to show that the words '*any dispute arising out of this contract*' are construed narrowly and limit the scope of the power of arbitrators [*Texaco v. Am*; *Tracer v. NES*; *Reddam v. KPMG; Berger III, p.2*]. Such a narrowly drafted clause is indicative of the parties' intention *'to limit arbitration to a particular subset of disputes'* [*Negrin v. Kalina*; *Century Indem co. case*; *Barclays v. Nylon ¶28*; *AFL-CIO v. Verizon New Jersey*].

30. This limitation intensifies in case of adaptation of contracts, where the arbitrators are required to go beyond their procedural obligations and rewrite the parties' contract [*Fouchard, p.25; Horn, p.173; Rubin*, *p.20; UN Doc. A/CN.9, ¶15*]. This creative nature of decision making requires express authorisation by the parties in addition to the standard arbitration agreement [*ICC 7544; Bernini, p.421; Craig II, p.144*]. This authorization should indicate distinctly, the triggering events which confer such creative competence on the arbitrators [*Berger I, p.8; Bernini, p.421; Craig II, p. 144*].
31. *In casu,* the arbitration agreement, which in itself is a separate contract contains no such express authorisation vesting the Tribunal with the power to adapt. This lack of express authorisation in the arbitration clause is prima facie evident when compared to the HKIAC Model Clause, on which it is based. Unlike the present clause, it contains an explicit reference empowering the arbitrator to go beyond their procedural duties to settle disputes relating to non-contractual claims [*Resp. Sub. ¶60*]. This garners extreme importance because Danubia recognises the power of adaptation of the arbitrators only upon express authorisation by the parties [*PO 2, ¶45*]. Thus, the Tribunal cannot assume the power to adjudicate on the disputes that were specifically excluded from its scope.
32. Additionally, the absence of an express provision presupposes the Parties' intention to maintain the sanctity of the Contract. The Tribunal should, therefore, be especially concerned before overriding the principle of *pacta sunt servanda* since the Parties clearly expressed their intention.
33. Moreover, as private declarations of intent are barred by the four corners rule, the arbitration agreement has to be interpreted objectively to give effect to a construction that is commercially logical [*Insigma v. Alstom*]. Viewed from this perspective, RESPONDENT, being a novice in the racehorse breeding industry, would have never agreed to enter into a contract which makes it vulnerable to arbitral discretion. Indeed, certainty and immutability of the contractual terms were essential for RESPONDENT to assess its future position resulting from this new venture. It coveted a contract which would reflect every risk allocation to minimize the chances of any undesired alteration in future. As a rule, in the absence of a specific reference to adaptation, it is presumed that the financial rewards stipulated in the contract already account for the risk of changed circumstances [*Bernardini, p.211*]. Correspondingly, adaptation should not be imposed by the

arbitrators against the agreed terms of the arbitration agreement.

34. For the foregoing reasons, RESPONDENT submits that the arbitration agreement does not give the Tribunal the power to adapt the Contract

2. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT UNDER THE *LEX ARBITRI*

35. While arbitration agreements accord the basic authority of contract adaptation, it is the *lex arbitri* which ultimately determines if the arbitrators are procedurally authorised to do so [*Insigma v. Alstom* ¶¶*30, 33; Van den Berg II, p.46*]. As outlined above, the *lex arbitri,* which is the Danubian Arbitration Law, is a verbatim adoption of the UNCITRAL Model Law [*PO 2, ¶14*]. *Travaux préparatoires* of Art. 28 (3) Model Law suggest that the drafters, upon extensive discussion, abjured from inserting a provision for adaptation of contracts [*Berger III, p.4*]. It was reasoned that parties are better equipped to authorise such powers to arbitrators [*ibid.*]. This practice is consistent with that of the Danubian courts [*PO 2, ¶45*]. Thus, unless expressly authorised, the Danubian Arbitration Law bespeaks a concept of arbitration that is strictly limited to traditional legal disputes and does not envision the admission of a claim of adaptation [*Art. 7(1), DAL*; *PO 2, ¶36*]. This is based on the fact that tribunals expect parties to exercise prudence, as it is highly unlikely that they are unaware of contingencies while drafting the contract [*ICC 1512*]. Therefore, a reasonable interpretation presumes professional competence and construes party silence on possible contingencies as a '*conscious decision to assume the risk of such eventualities*' [*ibid.; ICC 6281; Poznanski, p.80*].

36. *In casu*, CLAIMANT purports that the Parties intended to vest the Tribunal with the powers of contract adaptation [*Cl. Memo, ¶92*]. Yet, the Contract finds no such authorisation. This is even though CLAIMANT had prior experience of transacting in Danubia and suffered financial difficulties when their contract was not adapted due to the absence of any precautionary provision [*PO 2, ¶21*]. Now that CLAIMANT is in a state of predicament again, it is trying to drive RESPONDENT to the slaughterhouse. It was up to CLAIMANT to take suitable measures against unforeseen circumstances while drafting the Contract and they should not be able to make RESPONDENT bear the brunt of their professional incompetence. Thus, the Tribunal should not substitute itself for the Parties to make good a missing part of their contractual relations.

37. Even if the Tribunal were to assume such powers of contract adaptation, it would lead to vacatur of the award as it violates the Danubian Arbitration Law [*Arts. 34, 36 DAL*].

38. For the foregoing reasons, RESPONDENT submits that the Tribunal does not have the power of adaptation under the *lex arbitri*.

3. THE TRIBUNAL'S POWER TO ADAPT THE CONTRACT UNDER THE SUBSTANTIVE LAW IS INCONSEQUENTIAL

39. As shown above, the Tribunal does not derive competence to adapt the Contract from either the arbitration agreement or the *lex arbitri* [*Resp. Memo, ¶23*]. Thereby, the provisions of adaptation under the substantive law of Mediterraneo are nugatory as the Tribunal does not have the corresponding procedural authority [*Berger I, p.87*].

40. In sum, the Tribunal is not conferred with the powers of adaptation by all relevant sources.

B. EVEN IF EXTERNAL EVIDENCE IS PROVISIONALLY ADMITTED, THE INTENTION OF THE PARTIES TO DEPRIVE THE TRIBUNAL OF THE POWER TO ADAPT THE CONTRACT IS PERCEPTIBLE

41. CLAIMANT could have argued that the arbitration agreement is ambiguous, pursuant to which external evidence should provisionally be admitted to resolve the same. However, RESPONDENT submits that the arbitration agreement is unambiguous as it is not susceptible to more than one meaning. On the face of it, the arbitration agreement contains no authorisation for adaptation. Even if the Tribunal were to decide that the arbitration agreement is ambiguous justifying admission of extrinsic evidence, RESPONDENT submits that the Parties did not intend to confer the Tribunal with the powers of adaptation. This is based on the premise that the Parties entered into a short-term Contract that does not warrant adaptation **(1)**. Moreover, the choice of the Parties in favour of the application of the Danubian Law demonstrates a clear intention to exclude the adaptation mechanism **(2)**. Further, the assumption of the power to adapt by the Tribunal would be against the principles of party autonomy **(3)**.

1. THE PARTIES ENTERED INTO A SHORT-TERM CONTRACT

42. Adaptation clauses are of no practical importance in the realm of short-term contracts. These are simple, straightforward one-time transactions. On the other hand, long term contracts are complex as they shape an ongoing relationship between two parties who bind themselves in a bargain for a span of twenty or thirty years [*Berger V*; *Niggemann, p.54*]. This time factor makes such contracts highly susceptible to change owing to unforeseen events [*Craig I*; *Kolo, pp.5, 6*; *McKendrick Klausegger, p.78*]. Thus, there is a commercial need for adaptation only in the case of a long-term contract.

43. In the present case, the Parties entered into the Contract on 6th May 2017 under the pretext of a temporary lift of the ban on artificial insemination [*No A, ¶5*]. Though breeders were confident that the temporary lift of the ban would become permanent, the status quo was that the lift of the ban was only until December 2018 [*Cl. Ex. 1*]. This meant that the competitors in the racehorse breeding industry could only contract within this specific timeframe. The Parties, therefore, intended to maintain a long-term relationship as opposed to a long-term contract and this particular transaction was to be completed within the specified time limit [*Cl. Ex. 5, §8; PO 2, p.11*]. Owing to the fear of reinforcement of the ban and to be prepared for the breeding season

starting February 2018 [*PO 2, ¶11*], the Parties contracted to perform their obligations by 23 January 2018 [*Cl. Ex. 5, §8*]. Thus, the Parties merely entered into a one-time exchange of goods spanning for eight months. In this regard, the Contract is a short term one.

44. For the foregoing reasons, RESPONDENT submits that the Contract is a short-term and does not warrant adaptation.

2. THE CHOICE OF THE DANUBIAN LAW PROVES THAT THE PARTIES EXCLUDED THE MECHANISM FOR ADAPTATION OF CONTRACT

45. Common law jurisdictions hold that if a contract contains no express authorisation for adaptation, the party who is most affected has impliedly accepted all the risks involved [*McDonnell Case*]. This is even more so, when the contract contains an unambiguous allocation of risks. Notably, in the case of *Himpurna v. Indonesia* it was held that the tribunals should '*ascertain the rights and obligations of the parties to the particular contractual arrangements from which its authority is derived*' [*Himapurna Case*]. It went on to say that tribunals are not entitled to alter "*intentional, indeed emphatic"* risk allocation.

46. In the present case, the Parties contractually agreed on risk allocation by including a DDP provision. This meant that the seller would bear all the risks associated with the transaction, including but not limited to, customs formalities. Since the present arrangement was a result of intense deliberations, the Tribunal cannot alter the Parties' agreed risk allocation. Such an intrusion by the Tribunal, if any, would be contrary to the legitimate expectations and interests of the Parties.

47. In sum, the intention of the Parties to confer the Tribunal with the power to adapt cannot be deduced even on the provisional admission of external evidence.

3. THE TRIBUNAL'S COMPETENCE IS AGAINST THE PRINCIPLE OF PARTY AUTONOMY

48. CLAIMANT put forth that the Parties discussed the likelihood of providing for adaptation as a viable remedy [*Cl. Memo, ¶92*]. However, this agreement never materialised, and instead, the Parties agreed on a narrow hardship reference to be included in the Contract. This exclusion is based on the surmise that RESPONDENT would have never agreed to include authorisation of contract adaptation [*Resp. Ex. 3; Resp. Sub. ¶31*]. Such a lacuna that has been deliberately left open by the Parties cannot be filled by the Tribunal [*Chatterjee, p.539*; *Born 2, p.414; Lew, p.412*]. This is because the Tribunal derives its powers directly from the agreement between the Parties and here, they agreed to factor out the claim of adaptation from its scope. Thus, the assumption of the power to adapt by the Tribunal will violate the fundamental principle of party autonomy.

49. To conclude our submission, RESPONDENT requests the Tribunal to find that it does not have the power to adapt this Contract.

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The Parties have chosen the law of Danubia to govern the arbitration clause and the Tribunal does not have the jurisdiction and powers to adapt the Contract.

ISSUE 2. CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

50. CLAIMANT seeks to submit as evidence, a partial interim award rendered in another arbitration, in which RESPONDENT is a party. At the same time, it contests the Tribunal's jurisdiction to rule on RESPONDENT's challenge to submission of this evidence [*Cl. Memo, ¶50*]. By contrast, RESPONDENT submits that such powers are inherent and allow tribunals to curb procedural violations and enforce the duty of parties to arbitrate fairly [*Lebanon tribunal case, ILA Report, p.17*]. Thus, the Tribunal is within its power to adjudicate on the present claim.

51. Further, CLAIMANT argues that RESPONDENT did not discharge its burden of proof by sufficiently substantiating the illegality of evidence [*Cl. Memo, ¶45*]. It, however, overlooked the fact that the Tribunal has assumed that the evidence was procured unlawfully, either through a breach of confidentiality or through hacking [*PO 1, II*]. It is CLAIMANT who bears the burden to prove whether it is entitled to submit the contested evidence. This is based on the legal principle *ei incumbit probatio, qui dicit, non-qui negat* which states that the burden lies upon the party who affirms and not who denies a particular fact [*Graffi, pp.240, 243*].

52. In response to CLAIMANT's request for admission of the illegally procured partial interim award, RESPONDENT submits that *first,* its conduct in the other arbitration is inconsequential *ad rem* **(I)**, *second,* the evidence is inadmissible irrespective of CLAIMANT's involvement in its illegal procurement **(II)** and *lastly,* even if the Tribunal applies the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"), the evidence cannot be admitted (**III**).

I. RESPONDENT'S CONDUCT IN THE OTHER ARBITRATION IS INCONSEQUENTIAL *AD REM*

53. CLAIMANT ran a smear campaign, propagating personal attacks and untruths about RESPONDENT's contradictory behaviour [*Cl. Memo, ¶43; Letter by Langweiler, p.51*]. These fabricated and fallacious allegations were rubbished even by the opponent of RESPONDENT in the other arbitration [*Letter by Fasttrack, p.51*]. CLAIMANT contends that RESPONDENT made hypocritic and contrary assertions concerning adaptation of contracts. However, such a contention is without any merit. RESPONDENT respectfully requests the Tribunal to hold that the evidence is irrelevant because the two arbitrations are substantially **(A)**. Moreover, RESPONDENT's conduct in the other arbitration neither breaches its good faith obligations **(B)** nor does it qualify as estoppel **(C)**.

A. RESPONDENT'S CONDUCT IS IRRELEVANT AS THE TWO ARBITRATIONS ARE SUBSTANTIALLY DIFFERENT

54. CLAIMANT ludicrously argues that the two arbitrations in which RESPONDENT is taking part are analogous [*Cl. Memo, ¶¶59, 60, 72*]. However, RESPONDENT submits that the similarities extend

only to the application of HKIAC Rules and the law of Mediterraneo as the substantive law. Commercial parties strive to benefit out of every transaction they enter into and it is the prerogative of these parties to agree or disagree on a particular facet of their deal. Therefore, it should not come as a surprise to the Tribunal or CLAIMANT that RESPONDENT argued in favour of adaptation when it is to its benefit and there exists such possibility.

55. The hardship clause in the other arbitration is a verbatim adoption of the ICC Hardship Clause 2003 [*PO 2, ¶39*]. *Per contra*, the Parties in the present case deliberately chose to exclude the same because of its broad ambit covering all unprecedented situations [*Resp. Ex. 3*]. Instead, a narrow hardship reference was included in the Contract applying only to additional health and safety requirements or comparable unforeseen events [*Cl. Ex. 5, §12*]. In addition to this, the ICC Hardship Clause 2003, relied upon in the other arbitration, binds parties to renegotiate alternate terms if the performance of the contract becomes excessively onerous for a party [*ICC Hardship Clause, 2003*]. Furthermore, the contract law of Mediterraneo, a verbatim adoption of UNIDROIT Principles of International Commercial Contracts ("**UPICC**"), allows for the remedy of adaptation in case the parties fail to reach an agreement during such negotiations. [*Art. 6.2.3 (4) (b), UPICC*]. Thus, adaptation is logically warranted in the other arbitration, while in the present case, the hardship reference does not provide for any such remedy.
56. Moreover, the arbitration clause in the other arbitration is a replica of the HKIAC Model Clause. However, in the present case, the Parties agreed to narrow down the scope of the HKIAC Model Clause [*Resp. Ex. 1, ¶1*]. Any reference to include non-contractual obligations which could be interpreted as empowering the Tribunal to adapt the Contract was excluded [*ibid.*].
57. Additionally, the arbitration clause in the other arbitration is governed by the law of Mediterraneo [*PO 2, ¶39*] which allows for a broad interpretation of the clause [*No A, ¶16*]. On the other hand, the law of Danubia which governs the present arbitration clause [*Resp. Sub. ¶23*] provides for a narrow interpretation following the four corners rule [*No A, ¶15*].
58. Finally, the seat of the other arbitration is Mediterraneo which is an adaptation friendly country [*PO 2, ¶39*], while the seat of the present arbitration is Danubia which only allows for adaptation upon express authorisation of the parties [*PO 2, ¶36*].
59. Given the aforementioned differences between the two arbitrations, the request for consolidation of proceedings is not sustainable [*Letter by Langweiler, p.51; Art. 28 HKIAC*]. Therefore, to compare the two arbitrations and decide on the merits of the dispute based on a completely different proceeding would be grossly unfair and unjust to RESPONDENT. It would violate the fundamental rule of equal treatment of Parties and lead to challenge of the award on the same basis.
60. The table below outlines that there exist marked differences between the two arbitrations which

confirm the contrasting intentions behind the two agreements.

	The present arbitration	The other arbitration
Hardship Clause	Seller shall not be responsible ... for hardship, caused by **additional health and safety requirements or comparable unforeseen events** making the contract more onerous.	where a party to a contract proves that: The continued performance of its contractual duties has become excessively onerous due to **an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract;** and that it **could not reasonably have avoided or overcome the event or its consequences,** the parties are bound, within a reasonable time of the invocation of this Clause**, to negotiate alternative contractual terms** which reasonably allow for the consequences of the event.
Arbitration Clause	**Any dispute arising out of this contract,** including the existence, validity, interpretation, performance, breach or termination thereof *(...)* shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted	**Any dispute, controversy, difference or claim arising out of or relating to this contract**, including the existence, validity, interpretation, performance, breach or termination thereof **or any dispute regarding non-contractual obligations arising out of or relating to it** shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted
Applicable law	The law governing the arbitration clause shall be the law of **Danubia**	The law governing the arbitration clause shall be the law of **Mediterraneo**
Seat of arbitration	The seat of arbitration shall be **Vindobona, Danubia.**	The seat of arbitration shall be **Mediterraneo**

61. In sum, the two arbitrations that RESPONDENT is a part of are contradistinctive.

B. RESPONDENT'S CONDUCT IS NOT IN BREACH OF ITS GOOD FAITH OBLIGATIONS

62. Contrary to CLAIMANT's assertions [*Cl. Memo, ¶61*], RESPONDENT submits that it did not breach its good faith and fair dealing obligations embedded in the Mediterranean Contract Law [*Art. 1.7 UPICC*]. The terms good faith and fair dealing protect the reasonable expectations, the parties developed, as a result of the assertions and representations made by the other party [*Thomas, p.987; Vidal, p.63*; *Blessing II, p.160; Hosking, p.1.7; Park, p.296*]. *In casu*, the stance taken by RESPONDENT in a confidential arbitration proceeding with another party could not have violated the reasonable expectations that CLAIMANT had during the negotiations. Indeed, it was beyond the contemplation of RESPONDENT that CLAIMANT would plead reliance on representations made in private proceedings. Therefore, the breach, if any, was done by CLAIMANT itself by infringing on RESPONDENT's confidentiality interests.

63. In sum, RESPONDENT did not breach its obligation to act in good faith.

C. RESPONDENT'S CONDUCT DOES NOT QUALIFY AS ESTOPPEL

64. CLAIMANT relies on the doctrine of estoppel enshrined in the Mediterranean Contract Law [*Art. 1.8 UPICC*] to argue that RESPONDENT breached its obligation to adapt the Contract [*Cl. Memo, ¶61*]. While RESPONDENT does not dispute this well-accepted principle of law, its application in the present case is erroneous. The principle of estoppel is meant to protect a party who relies on representations to its detriment [*Anson, p.119; Boyer; Brian, p.241*]. In the instant case, CLAIMANT's request for adaptation does not emanate from the representations made by RESPONDENT in the other arbitration. This is corroborated by the fact that CLAIMANT received the information after filing the Notice of Arbitration [*PO 2, ¶40*]. The circumstances leading up to those representations arise in separate factual matrices. Thus, RESPONDENT cannot be estopped from denying adaptation in the present arbitration.

65. To conclude our submission, the two arbitrations are horses of different colours. Additionally, neither did RESPONDENT breach its good faith obligations nor is the doctrine of estoppel applicable to the present dispute.

II. THE ILLEGALLY PROCURED EVIDENCE IS INADMISSIBLE

66. Submission of unlawfully obtained evidence is antithetical to the integrity of the arbitral proceedings [*Cohen, p.994; Ireton, p.238*]. Thus, RESPONDENT submits that CLAIMANT's involvement in the illegal procurement of the evidence bars its admission **(A)**. Even if the Tribunal finds that CLAIMANT was not involved in the illegality, the contested evidence is still inadmissible **(B)**. Further, CLAIMANT's reliance on the IBA Rules should not be sustained by the Tribunal **(C)**.

A. CLAIMANT'S INVOLVEMENT IN THE ILLEGAL PROCUREMENT OF THE EVIDENCE BARS ITS ADMISSION

67. CLAIMANT argues that since it hired an intelligence company to obtain the award and did not explicitly mandate unlawful procurement, it cannot be held liable for any infraction [*Cl. Memo, ¶48*]. RESPONDENT submits that this averment is erroneous. Admission of evidence can be rejected on the ground that it has been procured illegally notwithstanding the extent of the party's involvement [*Methanex case, ¶¶54, 59*]. Such admission would also run counter to the principle of *ex turpi causa non oritur actio* - a right cannot stem from a wrong [*Blair, p.256*]. Notably, a contract is said to be illegal if one or both parties intend to perform the contract illegally or if it is entered into for an objectionable purpose [*Chitty, ¶¶16-017, 16-018*].

68. In the instant case, CLAIMANT entered into a contract with an objective to procure an award rendered in confidential proceedings, without the consent of the parties involved. This shows that CLAIMANT has no hesitation in disregarding laws and good faith obligations to serve its interests.

The established procedure for procurement of an award is to contact the HKIAC Secretariat requesting publication [*Moser, ¶12.37; Art. 45.5 HKIAC Rules*]. This is subject to the consent of the parties involved, reflecting appreciation towards the principle of confidentiality [*ibid.; Art. 42.5 HKIAC 2013/45.5 HKIAC 2018*]. In fact, HKIAC requires adherence to stricter requirements for publication of awards in comparison to other arbitral institutional rules [*SIAC Rules (2016), Art. 39; LCIA Rules (2014), Art 30.3; ICC Rules (2012), Appendix I, Art. 6*].

69. Since the Parties have agreed upon the usage of HKIAC Rules [*Resp. Sub. ¶55*], it is safe to assume that CLAIMANT is conversant with these rules. Nevertheless, it flouted the prescribed procedure and entered into a contract to procure the award unethically [*PO 2, ¶41*]. The company, CLAIMANT approached is infamous for using underhand techniques to procure information [*ibid.*]. Considering that the Parties were aware that the performance of this contract involved commission of an unlawful act, it is legally objectionable and taints both the parties involved [*Stoneleigh Case*]

70. In sum, it can be logically concluded that CLAIMANT's involvement in the illegal procurement of the contested evidence renders it inadmissible.

B. IRRESPECTIVE OF CLAIMANT'S INVOLVEMENT, THE EVIDENCE IS INADMISSIBLE

71. Notwithstanding, if the Tribunal were to decide that CLAIMANT is not involved in the illegal procurement of evidence, the same is inadmissible. The admission of such evidence vitiates the duty of arbitrators to ensure procedural fairness and equal treatment of Parties **(1)** and violates RESPONDENT's right to be heard **(2)**.

1. THE ADMISSION OF THE EVIDENCE VITIATES THE ARBITRATOR'S DUTY TO MAINTAIN PROCEDURAL FAIRNESS

72. CLAIMANT wrongfully submits that a breach of the confidentiality agreement or an illegal hack would not affect the admissibility of evidence [*Cl. Memo, ¶¶52, 55, 57*]. It also states that one of the primary reasons for admission of this evidence is the lack of strict rules in international arbitration [*Cl. Memo, ¶53*]. Conversely, RESPONDENT submits that while admitting illegally obtained evidence, tribunals must accord great importance to public policy limitations. Public policy rules limit liberal evidentiary standards on considerations of good judicial order which will be hampered on the admission of illegal evidence [*Reisman, p.794*].

73. *Ergo*, in deciding such matters, the tribunals cannot be as flexible as it could be in any other evidentiary matters. [*Pilkov, p.154*]. As a matter of fact, arbitrators have a general duty to embrace integrity, fairness and respect essential elements of due process, untainted by illegal conduct [*Art. 18 Model Law; Art. 14(4) LCIA; Art. V(1)(b) NYC; §33, English Arbitration Act; Berger, p.415; Newman; Park II, p.89*]. In *Libananco Holdings v. Republic of Turkey*, it was held that the tribunal '*must be regarded as endowed with the inherent powers required to preserve the integrity of its own process*' [*Libananco*

case, ¶80]. Such powers are core to the functioning of an arbitration, the effectuation of which is an indispensable duty of competent arbitrators [*ILA Report, p.17*]. The admission of data that is illegally obtained by or on behalf of a party would cause irreparable harm to the arbitral process and risks setting a precedent incentivizing future unlawful act [*ibid.; Hanotiau, p.285*].

74. In the instant case, RESPONDENT endeavoured to locate the plausible source of the evidence that CLAIMANT sought to admit, certain that the same was protected by confidentiality [*Letter by Fasttrack, p.52*]. Upon investigation, it was revealed that the information was obtained either from a breach of a confidentiality agreement by two former employees of RESPONDENT or from the hack of RESPONDENT's computer system [*ibid.*]. Either way, the evidence was obtained illegally [*PO 1, p.53, ¶III(1)(b)*]. Admission of this evidence threatens more than a breach of confidentiality, it is a direct threat to a fair, neutral, and orderly process maintenance of which is a crucial part of arbitrator's duty [*Hanotiau, p.285; ILA Report, p.17*].

75. For the foregoing reasons, it is immaterial whether or not CLAIMANT had any involvement as the arbitrator should protect the integrity of the process from any illegal act that adversely affects a party.

2. THE ADMISSION OF THE EVIDENCE VIOLATES RESPONDENT'S RIGHT TO BE HEARD

76. Arbitrators are not bound to admit all the evidence submitted by the parties. They are, however, bound to give parties every opportunity to be able to present their arguments [*Forsythe v. Gibbs; Ottawa v. FFF*]. Right to be heard in an arbitration proceeding encompasses the parties' right to participate, offer relevant evidence and to present rebuttal evidence [*O&G v. Chase; Max Marx v. Barnes; Segesser, p.1218*]. This requirement is the cornerstone of international commercial arbitration ensuring a *'fundamentally fair'* hearing [*Art. 18 Model Law; HKIAC Rules; Cl. Memo, ¶67; Terk v. Dockery, ¶709; Edwards v. McCullough; Gulf v. Exxon; Circle Indus. v. Parke; Born III, p. 3223; Marghilota, p.211*].

77. CLAIMANT wants to submit evidence from an arbitration proceeding, in which RESPONDENT is bound by a confidentiality agreement [*Letter of Fasttrack, p.52*]. It has tactfully disclaimed its liability on a mere technicality, arguing that it is not bound by any of the obligations under Art. 42 HKIAC Rules, 2013 [*Cl. Memo, ¶¶47, 49*]. However, if such evidence is admitted, RESPONDENT will not be able to effectively defend or rebut the same without breaching its confidentiality agreement with its opponent in the other arbitration. This is because all statements or deliberations put forth before the tribunal are deemed to be confidential [*Art. 42.4 HKIAC*]. Consequently, RESPONDENT finds itself in a quintessential *Catch 22* situation as its right to defend itself conflicts with its confidentiality obligation.

78. Moreover, CLAIMANT has preposterously requested the Tribunal to issue a protective order in the

form of redaction of the award or appointment of a confidentiality advisor [*Cl. Memo, ¶¶63, 64*]. Issuing such an order would be inconsequential as the Tribunal has already been prejudiced against RESPONDENT, in light of the allegations of hypocrisy by CLAIMANT. The Tribunal is thus left with no choice but to disallow the contested evidence in its entirety, lest RESPONDENT be forced to choose between the devil and the deep blue sea. Thus, RESPONDENT urges the Tribunal to take note of its precarious position and make a ruling in its favour.

79. For the foregoing reasons, this evidence should not be admitted to ensure that RESPONDENT's right to be heard is not violated.

C. THE TRIBUNAL SHOULD NOT APPLY THE IBA RULES TO DETERMINE THE ADMISSIBILITY OF THE EVIDENCE

80. CLAIMANT, in its submissions, referred to the IBA Rules to prove that the contested evidence is not barred from admission since it does not contain any of the trade secrets of RESPONDENT [*Cl. Memo, ¶72*]. However, RESPONDENT submits that the IBA Rules should not be referred in order to determine the admissibility of evidence. The Parties have not agreed upon their application [*Blanke, p.329, Lew, pp.22-29; Moses, p.102, Waincymer*]. Further, the IBA Rules do not bind the Tribunal as they do not form a part of the mandatory laws of the *lex arbitri* [*Redfern/Hunter, ¶26.71*].

81. CLAIMANT could have argued that the application of the IBA Rules is in accordance with international practice unifying different legal systems. However, the IBA Rules are not a halfway house between the civil and common law traditions, but are rather '*a misguided combination of…different traditions*' [*Park III, p.142; Shore, p.77*]. Thus, the admissibility of the contested evidence should be determined without referring to the IBA Rules.

82. To conclude our submission, RESPONDENT requests the Tribunal to find that the contested evidence is inadmissible irrespective of CLAIMANT's involvement in its procurement.

III. EVEN IF THE IBA RULES APPLY, THE EVIDENCE IS INADMISSIBLE

83. Notwithstanding the application of the IBA Rules to the present proceedings, RESPONDENT submits that the contested evidence should not be admitted as it contains commercially confidential information that can be used to RESPONDENT's detriment **(A)**. Further, the evidence in contention does not meet the IBA standards of admissibility **(B)**. Even if the evidence is deemed to meet the standards, it is not admissible before this Tribunal due to the breach of confidentiality and lack of authenticity **(C)**.

A. THE CONTESTED EVIDENCE CONTAINS COMMERCIALLY CONFIDENTIAL INFORMATION

84. CLAIMANT argues that the contested award does not contain any confidential business information of RESPONDENT [*Cl. Memo, ¶63*]. To the contrary, RESPONDENT submits that the evidence indeed contains confidential information. Under Art. 9(2)(e) IBA Rules, a tribunal excludes admissibility

of evidence on '*grounds of commercial confidentiality […] that it determines to be compelling*'. Commercial confidentiality covers business related facts which a company intends to keep secret; has an economic interest in maintaining secrecy or documents it has protected by confidentiality agreements with third parties [*Marghitola, pp.402, 403*].

85. In the instant case, the award on jurisdiction is based on the information and deliberations about contractual clauses and terms of the agreement, indicative of RESPONDENT's conduct in its dealings. The inclusion of a broadly worded hardship and arbitration clause in the other contract, where it was the seller, is part of RESPONDENT's business strategy. This strategy is tailored to ensure that RESPONDENT is adequately protected in every transaction from risks arising out of unforeseen circumstances. Since racehorse breeding industry is highly competitive [*No A, ¶4*], RESPONDENT incontrovertibly wants to keep its business strategy a secret, lest it jeopardises its reputation as a viable and dependable business partner.

86. As a consequence, RESPONDENT took all reasonable measures to ensure that its business tactics are kept confidential. It opted for the HKIAC 2013 Rules and made all third parties sign confidentiality agreements to protect its interests [*PO 2, ¶41*]. The logical conclusion is that RESPONDENT did not want any details of the arbitration to be revealed to a party who is in no-way connected to the proceedings [*Smeureanu, p.172*].

87. In sum, the partial interim award contains commercially confidential information of RESPONDENT, protection of which is paramount.

B. THE CONTESTED EVIDENCE DOES NOT MEET THE IBA STANDARDS OF ADMISSIBILITY

88. The IBA Rules lay down its standards of admissibility in Art. 9(2)(a). For any evidence to be admitted under the IBA Rules, it needs to be relevant to the case and material to its outcome. RESPONDENT submits that by virtue of its illegality, the contested evidence has to meet a heightened threshold of relevance and materiality **(1)**. Further, the evidence sought to be admitted is neither relevant to the case **(2)** nor material to its outcome **(3)**.

1. THE IBA STANDARDS OF ADMISSIBILITY REQUIRE A HEIGHTENED THRESHOLD OF RELEVANCE AND MATERIALITY

89. CLAIMANT could have argued that the IBA Rules provide for compliance with the lowest standards of relevance and materiality [*Born II, p.2310, Pilkov, p.152*]. However, RESPONDENT submits that when the admissibility of illegally obtained evidence is in question, a heightened threshold of relevance and materiality is justified [*Harvalic, p.34*]. While deciding this heightened threshold, due regard must be given to the timing of the unlawful activity. Since the said illegal act was carried out during the arbitration [*Letter by Langweiler*], there exists a strong presumption against its admissibility [*ibid., p.34*], amplifying the threshold of relevance and materiality.

90. For the foregoing reasons, the evidence's admissibility is subject to a heightened threshold of admissibility.

2. THE EVIDENCE SOUGHT TO BE ADMITTED IS NOT RELEVANT TO THE CASE

91. Contrary to CLAIMANT's assertion, the contested evidence is irrelevant in proving RESPONDENT's inconsistent behaviour or that the latter agrees with CLAIMANT's stance regarding adaptation [*Cl. Memo, p.71*].

92. The evidence is considered to be relevant if it supports or refutes the existence of any fact that is of consequence in the case [*Pilkov, p.148*]. In international arbitration, the relevance of evidence is defined as having a logical connection with what it purports to prove in the case [*ibid.*]. Tribunals have wide discretionary powers to admit evidence upon cautious evaluation of its probative value and reject evidence that is irrelevant to the facts it seeks to prove [*ibid., p.147*].

93. As has already been submitted, the two arbitrations are notably different and there exists no rational basis for comparison [*Resp. Sub. ¶60*]. Thus, the position of RESPONDENT in the other arbitration regarding adaptation is not pertinent to this proceeding.

94. Since this evidence is irrelevant, CLAIMANT's line of argument that its right to be heard will be violated [*Cl. Memo, ¶¶66, 71*] is fundamentally flawed. A party's right to be heard is limited to the subject matter of the proceedings [*Spruchreife, p.103*]. Hence, any assertion or evidence that does not have a bearing on the subject matter of the arbitration or is irrelevant to reach a final decision, can be rejected without violating a party's right to be heard [*BGer, 1996; BGH, 1963; Reiner; Riegler, §59.4, p.337, Voit, §1042 ¶21*] Correspondingly, CLAIMANT should not be permitted to produce irrelevant evidence in the guise of its right to be heard.

95. For the foregoing reasons, the evidence in question is not relevant to the present case.

3. EVEN IF THE EVIDENCE IS RELEVANT TO THE CASE, IT IS NOT MATERIAL TO ITS OUTCOME

96. The materiality of evidence concerns itself with the sufficiency of the evidence. Upon admission of all relevant evidence, every subsequent evidence concerning the same fact becomes less material to the outcome [*Pilkov, p.149*]. Relevant evidence, therefore, need not always be material to the outcome of the case [*ibid.*].

97. *In casu*, even if the Tribunal were to decide that the contested evidence is relevant to the case, RESPONDENT submits that it is not material to the outcome of the case. CLAIMANT in its written submission, has relied on the remedies provided for in UPICC [*Cl. Memo, ¶136*], the drafting history of clauses [*Cl. Memo, ¶¶86-94*], negotiations [*Cl. Memo, ¶92*] and post-contractual conduct [*Cl. Memo, ¶¶143-154*] to prove its claim for adaptation [*Cl. Memo, ¶154*]. Reliance on all this has depreciated the probative value of the contested evidence, which is anyway not connected to the

present case.

98. For the foregoing reasons, the evidence is not material to the outcome of the case.

C. EVEN IF THE CONTESTED EVIDENCE IS DEEMED TO MEET THE IBA STANDARDS, IT IS NOT ADMISSIBLE DUE TO THE BREACH OF CONFIDENTIALITY AND LACK OF AUTHENTICITY

99. Even if the Tribunal finds that the evidence is relevant and material, its admissibility has to be analysed with due regard to the interests of the party who has been a victim of an unlawful act. [*Dolling v. Merrett*]. Hereby, tribunals should balance a party's need to submit necessary evidence with its obligation to respect the confidentiality attached to certain documents [*Reisman, p.737*]. In the present case, RESPONDENT has stressed on confidentiality of the contested evidence from the onset of these proceedings. It specifically chose arbitral rules that endorse strong confidentiality provisions and an administering institution that abstains from publication without prior consent. RESPONDENT covered costs of every element in the process including confidentiality. Over and above, the Tribunal should especially be concerned that CLAIMANT was itself involved in breaching the confidentiality interest of RESPONDENT. Therefore, if the Tribunal were to admit the award it may risk abetting the breach of confidentiality obligations in the other arbitration.

100. Furthermore, mere relevance and materiality of contested evidence does not lead to its admission [*EDF Case; Harvalic, p.35*]. It shall pass the test of *minimum indica of reliability* which means that the evidence should be authentic and accurate [*ibid.*]. *In casu*, the company from which the partial interim award was procured had a doubtful reputation in the market [*PO 2, ¶41*]. Since the award was not obtained from a reliable source, there exists every possibility of it being tampered with, miring its authenticity. Thus, it would be a waste of time and money to admit evidence that cannot be authenticated, especially in light of RESPONDENT's binding confidentiality obligations.

101. To conclude our submission, RESPONDENT submits that even if the Tribunal were to apply the IBA Rules, the evidence is nonetheless inadmissible.

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The contested evidence should not be admitted in light of its illegal procurement. Admission of such evidence violates procedural fairness and RESPONDENT'S confidentiality interests.

PART TWO. ARGUMENTS ON THE MERITS OF THE CASE

ISSUE 3. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 RESULTING FROM ADAPTATION OF THE PRICE EITHER UNDER §12 OF THE CONTRACT OR UNDER THE CISG

102. In pursuit of a long-term relationship, RESPONDENT accommodated every possible demand made by CLAIMANT. Not only did it agree to contract at a very high price, but also included a hardship reference to cater to CLAIMANT's interests [*Cl. Ex. 4, ¶4*]. Little did RESPONDENT know that giving CLAIMANT this inch would cost it a mile. While RESPONDENT adhered to the sanctity of the Contract, CLAIMANT stooped as low as steering clear of its obligations it voluntarily undertook. Over and above, it demanded an extra-contractual remedy.

103. RESPONDENT will demonstrate that CLAIMANT is not entitled to recover USD 1,250,000 through an adaptation of the price. *First,* §12 of the Contract neither considers the present event as hardship nor does it remedy the same with adaptation **(I)**. *Second*, the contractual price cannot be adapted even under the CISG **(II)**.

I. CLAIMANT IS NOT ENTITLED TO USD 1,250,000 THROUGH AN ADAPTATION OF THE PRICE UNDER §12 OF THE CONTRACT

104. After prolonged discussions, the Parties agreed to include a hardship reference in the Force Majeure Clause [*Cl. Ex. 5, ¶12*]. CLAIMANT's interpretation of the aforementioned clause suggests that the Parties had a common intent to include customs regulation in the hardship reference and a mechanism that would ensure the adaptation of price [*Cl. Memo, ¶¶91, 92*]. However, whether §12 is examined from the subjective point of view of RESPONDENT **(A)** or an objective point of view of a '*reasonable person*' **(B)**, the language conveys a contrary intent [*Hogg/Bishop/Barnhizer, p.146*]. Moreover, CLAIMANT can point to no provision in the Contract that demonstrates the Parties' intention to allow for adaptation **(C)**.

A. SUBJECTIVE INTERPRETATION OF §12 OF THE CONTRACT REQUIRES CLAIMANT TO BEAR THE RISKS OF THE TARIFF

105. CLAIMANT argues that the Parties shared the intention of relieving it from the risks of changes in customs regulation [*Cl. Memo, ¶¶91, 94; No A, ¶19*]. However, RESPONDENT submits that a perusal of the prior negotiations by virtue of Art. 8 CISG manifests no such intent. Pursuant to Art. 8(1) CISG, the parties' mutual subjective intent governs their contract [*UNCITRAL Digest, p.265*]. This read with Art. 8(3) CISG provides that pre-contractual negotiations steer the determination of parties' intent [*ICC 7920, p.83; Packaging machine case, note 3.3; Farnsworth, in Bianca/Bonell, p.100*].

106. During the prior negotiations, CLAIMANT's acceptance of DDP delivery was conditional on re-allocation of certain risks [*Cl. Ex. 4, ¶4*]. It sought complete protection from the risks of customs

regulation and import restrictions or, *at minimum*, a hardship clause to regulate *custom health requirements* [*ibid.*]. The first option would not have yielded any substantial benefit to RESPONDENT as it would have to undertake the same amount of risks against payment of a higher price [*A No A, ¶4*]. Hence, it acceded to the latter and CLAIMANT could not have been unaware of this intent. The fact that the Parties directed their subsequent discussions solely towards the inclusion of a hardship reference reinforces their intention to discard the first alternative [*Resp. Ex. 1, 2, 3*].

107. This interpretation is affirmed by the language of §12 which excludes CLAIMANT's responsibility from '*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous'* [*Cl. Ex. 5*]. Application of the principle of *ejusdem generis* follows that when a list of specific words precedes a catch all phrase, the phrase shall be interpreted in light of the characteristics of the specific words [*Burton, p.59; Azfar, p.251; Kelley, p.100; Paulus, p.307*]. *In casu,* the catch-all phrase '*comparable unforeseen events'* must be interpreted bearing in mind the features peculiar to health and safety requirements. To hold that the phrase was to include the present customs tariff within its ambit would deprive it of the effect that the Parties intended it to have.

108. Further, CLAIMANT argues that the real intention for the inclusion of DDP was to mutually benefit from its greater experience in transportation and documentation and not to burden it with further risks [*Cl. Memo, ¶90; No A, ¶18*]. Contrarily, RESPONDENT submits that regardless of the reasons behind its inclusion, the use of keywords such as DDP creates certain rights and obligations which the Parties ought to fulfil [*Ramberg, p.20*]. Consequently, CLAIMANT cannot rely on such intention to escape from the inherent obligations of DDP.

109. In sum, subjective interpretation of §12 excludes the present event from its ambit.

B. ALTERNATIVELY, AN OBJECTIVE INTERPRETATION OF §12 OF THE CONTRACT REQUIRES CLAIMANT TO BEAR THE RISKS OF THE TARIFF

110. Should the Tribunal find that the Parties' subjective intent cannot be discerned, an objective understanding of §12 leads to the same conclusion [*Fruit &Vegetables case; MCC Marble case; Chemical product case; Guang Dong case; ICC 8324; Leather goods case*]. Determination of an objective intention depends on what a reasonable third person, in the same situation as that of the Parties, could have plausibly perceived [*Amco Asia Corp Case; CCIG Award 1999*]. In the present case, the Parties agreed to change the delivery terms from EXW to DDP [*Cl. Ex. 4, ¶3*]. The feature that distinguishes DDP from other INCOTERMS is that it is the only delivery term that places the obligation of import clearance and payment of import duty upon the seller [*Incoterms Explained*]. In case the Parties intended to relieve CLAIMANT from the risks of custom changes, they would have chosen any other INCOTERM. Therefore, the Parties' unequivocal intent to include DDP would lead any reasonable person to believe that CLAIMANT consented to bear the burden of customs tariff.

111. Even though the Parties incorporated a modified DDP, customs tariff was not one of the risks which was re-allocated to RESPONDENT. Certain risks that RESPONDENT was willing to accommodate were explicitly reflected in the Contract [*No A, ¶7; Resp. Ex. 3, ¶5*]. For instance, risk of tank rental and handling were provided under §10, insurance under §13 and health and safety requirement under §12 [*Cl. Ex. 5*]. Unlike the Parties' categorical transfer of risks in the aforementioned clauses [*ibid.*], the absence of a similar clause for customs regulation would induce any reasonable person to infer allocation of risks of customs regulation in favour of CLAIMANT.

112. In sum, an objective interpretation of §12 excludes the present event from its ambit.

C. IN LIGHT OF THE PARTIES' INTENT, ADAPTATION CANNOT BE A REMEDY

113. The wording of a contract is the inceptive step of contract interpretation [*Schwenzer/Hachem/Kee, ¶26.16; Ullman, p.94*]. Therefore, any manifestation of the intent to adapt must arise from the language of the clause itself [*ibid.*]. Generally, hardship clauses subsume two facets: one facet enlists hardship circumstances and the other provides for the effects of those circumstances [*Schmitthoff, pp.82, 85; Farnsworth, §9.9a, p.646; Rimke, p.228; Brunner, p.385*]. Here, the Parties included a hardship reference in the Force Majeure Clause *in lieu* of a separate hardship clause [*Resp. Ex. 3, ¶5*]. Though the reference provided an exhaustive list of the hardship situations, it did not mention any remedy exclusive to such situations. Instead, the Clause provided for exemption from responsibility [*Cl. Ex. 5*] which is a remedy exclusive to force majeure events [*Lookofsky II, p.159; Art. 6.2.2 UPICC, Comment 6; DiMatteo, p.263*]. Since exemption is not a remedy specific to hardship and the Parties lacked any implied intent to adapt [*Resp. Sub. ¶31*], adaptation cannot be granted.

114. Moreover, CLAIMANT itself put forth the proposal for inclusion of the ICC Hardship Clause 2003 [*Resp. Ex. 2, ¶4*]. Notably, the clause itself does not provide for adaptation as a remedy, following the failure of renegotiation [*ICC Legal Standards, p.14; Schwenzer II, p.723; Elcin, p.620*]. Had the intention of CLAIMANT been to provide for adaptation, it would not have insisted on the inclusion of a standard clause that does not provide for the remedy of adaptation. Therefore, the negotiations regarding the inclusion of this clause show that the Parties never intended to have adaptation as a remedy under §12.

115. Further, CLAIMANT argues that '*adaptation is the natural effect for hardship'* [*Cl. Memo, ¶¶81, 84*]. However, the general principles of commercial contracts evince a contrary position. The UPICC and PECL, for instance, not only provide for adaptation but also for the termination of contract as a remedy for hardship [*Art. 6.2.3 UPICC; Art. 6:111 PECL*]. In the same vein, even if we were to assume that CISG governs hardship, it envisages the remedy of exemption from performance as opposed to adaptation [*Art. 79(1) CISG*]. Thus, hardship does not in itself beget adaptation.

116. Contrary to CLAIMANT's contentions, RESPONDENT's post contractual conduct does not manifest

any intention to adapt [*Cl. Memo, ¶¶149, 153*]. CLAIMANT argues that the statement made by Mr. Shoemaker, an ostensible agent of RESPONDENT, constituted a valid assurance. However, mindful of his limited authority, Mr. Shoemaker avoided making any promises that he would not be able to keep [*Resp. Ex. 4, ¶5*]. Instead, he made a neutral statement affirming that CLAIMANT would be entitled to anything that has been stipulated in the Contract [*ibid., ¶4*].

117. CLAIMANT further argues that Mr. Shoemaker had the power to authorise adaptation [*Cl. Memo, ¶147*]. In contrast, RESPONDENT argues an agent, merely acting as a conduit pipe, cannot bind the principal with its acts [*Ziegel, p.63*]. Mr. Shoemaker was introduced to CLAIMANT as the person responsible for any queries regarding the Contract [*PO 2, ¶32*]. Since his authority was restricted to answering questions, he was not authorised to make contractual commitments. Thus, his alleged assurance cannot amount to an agreement to adapt.

118. Additionally, unlike CLAIMANT's assertions, RESPONDENT has not violated the principle of *venire contra factum proprium* [*Cl. Memo, ¶150*]. The principle forbids a party to contradict with itself to the disadvantage of another party [*Sombra, p.29; Zimmermann/Whittaker, p.24; Uçaryılmaz, p.168*]. As outlined above, CLAIMANT's interests were not jeopardised by RESPONDENT's subsequent conduct in the other arbitration [*Resp. Sub. ¶64*]. Thus, the same is irrelevant to the present proceedings.

119. To conclude our submission, CLAIMANT is not entitled to USD 1,250,000 through an adaptation of price under §12 of the Contract.

II. CLAIMANT IS NOT ENTITLED TO USD 1,250,000 THROUGH AN ADAPTATION OF THE PRICE UNDER THE CISG

120. Assuming that adaptation of price is not covered under §12 of the Contract, RESPONDENT submits that the same cannot be provided under the CISG. Although the Parties agreed for the Contract to be governed by the CISG [*Cl. Ex. 5, ¶14*], hardship cannot be conceived either under Art. 79 CISG **(A)** or under the gap-filling provisions via Art. 7(2) CISG **(B)**.

A. CLAIMANT IS NOT ENTITLED TO ADAPTATION UNDER ART. 79 CISG

121. Art.79 CISG exempts liability of obligations yet to be performed only when the prerequisites set forth by the provision are fulfilled [*Lookofsky, Art. 79 ¶300; Ishida, p.334; Flechtner, p.823*]. As opposed to CLAIMANT's contentions, the inclusion of a hardship clause constitutes a derogation from Art. 79 CISG by virtue of Art. 6 CISG **(1)**. Moreover, Art. 79 CISG does not regulate hardship **(2).** In any event, the imposition of tariff does not satisfy the requirements set forth under Art. 79(1) CISG **(3)** nor does it warrant the remedy requested by CLAIMANT **(4)**.

1. THE INCLUSION OF A HARDSHIP REFERENCE IS A DEROGATION FROM ART. 79 CISG

122. CLAIMANT argues that the insertion of §12 does not constitute a derogation pursuant to Art. 6 CISG as the Clause is consistent with the substance of Art. 79 CISG [*Cl. Memo, ¶¶105, 109*].

Contrarily, RESPONDENT submits that §12 provides for a special regulation of the problem of changed circumstances. As a result, it precludes the application of this exemption provision [*A No A, ¶20*].

123. Art. 6 CISG allows the agreement of the parties to override specific provisions of the CISG [*Honnold/Flechtner, p.475; Liu, ¶4.1*] and Art. 79 CISG is no exception to this rule [*UNCITRAL Digest, p.834*]. In fact, this provision is frequently derogated from because commercial parties, *au fait* with the risks involved, are likely to incorporate clauses specific to their needs and interests [*Flambouras, p.283; Zeller, p.157*]. Consequently, these contractual clauses supersede the standard established by the exemption provision of the CISG [*Brunner, p.422; Andersen, p.19*].

124. In the present case, §12 supplants the standards put forth by Art. 79 CISG by tacitly derogating from the same. In contrast to CLAIMANT's averments [*Cl. Memo, ¶106*], a derogation can either be explicit or implicit [*Kroll/Mistelis/Viscasillas, Art. 6 ¶15*]. To constitute an implicit derogation, a contract clause must contain an exhaustive list of impediments [*Mietten, p.38*]. §12 satisfies this desideratum as it exempts CLAIMANT from a comprehensive list of unlikely occurrences [*Cl. Ex. 5, ¶12*]. Even the catch-all phrase was restricted to events '*comparable to health and safety requirements'* [*Resp. Sub. ¶107*]. Therefore, it constitutes an implicit derogation from Art. 79 CISG.

125. Further, CLAIMANT's argument that '*in order to derogate (…), it would be necessary that Parties have agreed on a provision with a conflicting idea to the CISG*' is fallacious [*Cl. Memo, ¶110*]. Contrarily, RESPONDENT submits that Art. 79 CISG is derogated from when its scope is narrowed down by a contractual clause [*Feigler, ¶5*]. Here, RESPONDENT urged CLAIMANT to include a hardship reference narrower than the ICC Hardship Clause, declaring the latter to be '*too broad'* for the purposes of the Contract [*Resp. Ex. 3, ¶5; PO 2, ¶12*]. CLAIMANT accepted this inclination and the Parties reached a mutual agreement of incorporating a narrow reference [*ibid.*]. The ICC Hardship Clause, like Art. 79 CISG, governs '*any event*' making the contract excessively onerous [*Art. 79(1) CISG*]. In contrast, §12 regulates a list of specific events [*Cl. Ex. 5, ¶12*]. Hence, this tailor-made contractual provision must prevail over the corresponding provision of the CISG [*Corn case; ICC 2478; Zaccaria, p.160*].

126. For the foregoing reasons, the inclusion of §12 is tantamount to a derogation from Art. 79 CISG.

2. ART. 79 CISG DOES NOT REGULATE HARDSHIP

127. Contrary to CLAIMANT's belief, RESPONDENT argues that Art. 79 CISG proscribes economic hardship [*A No A, ¶21*; *Chinese goods case; Tomato concentrate case; Case No. 11/1996 (BUL); Vital Berry v. Dira*] which warrants exemption on account of an increased cost of performance [*Nuova v. Fondmetall; ICC 8873; Carlsen, §§I–IV*]. This view is asseverated by the interpretation of Art.79 CISG through the Vienna Convention on the Law of Treaties ("**VCLT**"). Art. 31 VCLT bases its interpretative mechanism on the ordinary meaning of the terms of the treaty. Impediment, as

defined in the Oxford Dictionary, means '*a hindrance or obstruction in doing something*' [*Oxford Dictionary*]. The terms *obstruction* and *hindrance* connote the impossibility of performance, as opposed to hardship, allowing no room for the same to be subsumed under Art. 79 CISG [*Klepac, pp.17-18*].

128. Additionally, reliance on the *travaux préparatoires* of the provision under Art. 32 VCLT leads to the same conclusion. An examination of the deliberations that culminated in Art. 79 CISG exhibits the intent of the drafters to exclude any hypothesis of hardship [*Zaccaria, pp.163-165*]. The exponents of this view assert that there is no gap in the CISG [*Honnold, pp.349-350*]. In fact, the drafters consciously omitted hardship to prevent using '*one size of economic risk fits all*' approach and compel parties to negotiate customized hardship clauses into their contract [*Spivack, p.789*].

129. Furthermore, Art. 79 CISG entails a causal link between impediment and the failure of performance. Hardship situations, however, lack this nexus as the non-performance is caused not by the impediment but by the party's own decision not to perform [*Petsche, p.157*]. Hence, unlike CLAIMANT's assertion, Art. 79 CISG does not govern hardship situations.

130. CLAIMANT bases its claim on CISG AC Opinion No. 7 to highlight the possibility that Art. 79 CISG encompasses hardship situations [*Cl. Memo, ¶116; CISG-AC Opinion No. 7*]. It argued that such interpretation is in congruence with the CISG's general principle of uniformity [*Cl. Memo, ¶115*]. However, RESPONDENT submits that this reliance must be disregarded. Several jurists have acutely criticised this opinion affirming that the CISG AC has adopted an unduly liberal standard for exemption that has fostered further grounds for dissension and divergence [*Nagy, p.20*]. It is also reasoned that this speculation by the CISG AC has ultimately thwarted its goal of uniformity entrenched in the CISG [*ibid.; Petsche, p.149; Klepac, p.45*].

131. For the foregoing reasons, hardship is not conceivable under Art. 79 CISG.

3. IN ANY EVENT, THE IMPOSITION OF THE TARIFF DOES NOT SATISFY THE REQUIREMENTS UNDER ART. 79(1) CISG

132. Should the Tribunal come to a contrary conclusion, RESPONDENT submits that the imposition of the 30% customs tariff does not satisfy the requirements set-forth in Art. 79(1) CISG cumulatively [*Iron Molybdenum Case; Vital Berry v. Dira; Klepac, p.27; UNCITRAL Digest, p.830*]. Notwithstanding the fact that the present event was beyond the control of the Parties [*Cl. Memo, ¶128*], CLAIMANT was bound to perform its obligations as the event was foreseeable **(a)**, avoidable **(b)**, and not a direct cause of the non-performance **(c)**.

a. The imposition of the tariff was foreseeable at the time of Contract conclusion

133. Apparently being surprised that the risks it undertook materialized, CLAIMANT alleges that the imposition of the tariff was beyond the expectations of the Parties [*No A, ¶¶10, 11*]. Howbeit, only those events that are '*so outside the bounds of probability that reasonable parties would not provide for it*' give

rise to hardship [*Perillo, p.13; Da Silveira, p.325; Nwafor, pp.39-40*]. Precisely, risks typical to particular contracts would not qualify as hardship [*Silveira, p.325*]. As Dr. Zeller explains, a party that usually ships goods ought to be cognizant of the perils of the sea and hence, cannot plead exemption on such grounds [*Zeller, p.157*]. In consonance with this view, the Secretariat Commentary and arbitral jurisprudence note that occurrences like government interventions and embargoes have been observed in the past and can be expected to arise again [*Secretariat Commentary, Art. 79 Comment 5; Liu, ¶4.4; DiMatteo, p.288*]. *In casu,* the main reason for a DDP delivery, as rightly pointed out by CLAIMANT, was its much-vaunted superiority and proficiency in international transport [*Cl. Memo, ¶90; Cl. Ex. 3, ¶3*]. Considering that tariff impositions are not uncommon in international trade [*UNCTAD, p.9*], it was reasonable for RESPONDENT to expect CLAIMANT to have foreseen the imposition, guided by this '*greater experience*'.

134. CLAIMANT argues that the tariffs, particularly on horse semen, were not foreseeable [*Cl. Memo, ¶134*]. However, RESPONDENT submits that a potential problem, discussed by the parties during negotiations, is deemed foreseeable [*Brunner, p.159*]. Thereupon, an assumption of risk by the aggrieved party can be drawn [*ibid.*]. Thus, the fact that the Parties extensively discussed the issue of custom regulation reveals that such an event was indeed foreseen [*Cl. Ex. 4, ¶4*].

135. Furthermore, CLAIMANT could have argued that the tariff imposition by Mediterraneo was unforeseeable. However, the same is untenable as the action did not constitute a breach of its World Trade Organisation ("**WTO**") obligations. A WTO member can impose tariffs invoking Art. XXI GATT by citing 'national security reasons' [*GATT, Art. XXI- Security Exceptions*] which cover economic grounds including protection of one's domestic industry. In the present case, the government of Mediterraneo imposed 25% tariff to safeguard its domestic agriculture industry [*Cl. Ex. 6, ¶2*]. Therefore, this action does not contravene its WTO obligations. Moreover, the Mediterranean President, during the election campaign, adequately hinted at his preference for safeguarding domestic industries [*ibid.*]. One such indication was the appointment of Ms. Cecil Frankel, a vehement critic of free trade, as the agricultural minister [*PO 2, ¶23*]. She had been known for her protectionist ideologies and her proclivity towards import substitution in Mediterraneo [*ibid.*]. All this amounts to sufficient intimations of an impending executive action by Mediterraneo.

136. Additionally, the retaliatory action by the government of Equatoriana was a plausible out-turn. WTO Dispute Resolution mechanism itself postulates that failure of a parley enables the exporting party to take retaliatory actions against the counterparty [*Safeguards WTO, p.14*]. Such right is often considered necessary to balance the trade equilibrium among the members [*ibid.; Martin/Vergote, p.69*]. *In casu*, the 30% retaliatory tariff by the government of Equatoriana was a natural corollary

of the impositions by Mediterraneo [*PO 2, ¶24*] and was therefore foreseeable.

137. Moreover, RESPONDENT's conduct in the other arbitration is in no manner relevant in determining the foreseeability of the event under the present arbitration [*Resp. Sub. ¶55*].

138. In view of the above, it is highly unlikely for a reasonable person to not have foreseen the 30% tariff imposition by Equatoriana.

b. The imposition of the tariff was avoidable

139. Under Art. 79(1) CISG, non-performance is excused if the impediment is unavoidable [*Schwenzer, Art. 79 ¶11; Atamer, in Kroll/Mistelis/Viscasillas, Art. 79 ¶43*]. However, courts and tribunals have seldom granted an exemption based on unavoidability owing to the high threshold of the limit of sacrifice prescribed by the provision [*DiMatteo, p.275*]. *Ergo*, if economic unaffordability is to be conceived under Art. 79 CISG, the standard ought to be one akin to force majeure events [*Brunner, p.214; Honnold/Flechtner, p.485*]. This threshold for force majeure occurrences mandates excessive onerousness of performance. Accordingly, a slight increase in price causing mere onerousness does not warrant an exemption from performance under Art. 79 CISG [*Scafom International case; Zeller, p.158; Brunner, p.391; Silveira, pp.317-18; Schwenzer II, p.714*].

140. In the present case, CLAIMANT demands an adaptation averring that the tariff imposition made the shipment 30% more expensive and resulted in considerable hardship [*No A, ¶18; Cl. Ex. 8, ¶6*]. However, RESPONDENT submits that jurists have postulated that even a 100% price increase is insufficient to constitute a valid ground for hardship [*Schwenzer II, p.716*]. As a matter of fact, requests for hardship exemption based on a 30% price increase have been repeatedly dismissed. Likewise, in the case of *Nuova Fucinatti v. Fondmetal International*, it was held that a 30% increase in the contractual price was not a valid basis to claim a hardship exemption and *'would not justify a party avoiding the contract'* [*Michelini, p.155*]. The same dictum has been echoed by numerous courts around the world [*Chinese goods case; Steel Ropes case, p.178; ICC 8486; FeMo Alloy Case; Café case; Mietten, p.41*].

141. Additionally, the adoption of the term '*impediment*' in Art. 79 CISG signifies the objective character of the obstacle, instead of its subjective aspect [*Liu, ¶4.2*]. Application of this rationale follows that this imposition would have qualified as an impediment, provided it uniformly affected the whole horse industry. However, this is not evident in the present case. RESPONDENT, who was another competitor in the same industry, would not have been financially endangered following the payment of tariffs [*PO 2, ¶30*]. It was only CLAIMANT which suffered financial difficulties because of the imposition, making this onerousness subjective.

142. Moreover, CLAIMANT's financial standing should not be a criterion to bring the present event within the ambit of Art. 79 CISG [*Cl. Ex. 8, ¶6*]. Financial capability to perform is considered the basic assumption underlying all commercial contracts [*Perillo, p.122; Liu, ¶6.2*]. In principle, an

impaired financial position is a party's own problem and hence should not be an excuse to shift the risk to the counterparty [*Brunner, p.436; Lookofsky II, p.163*]. *In casu,* CLAIMANT has time and again tried to circumvent its contractual obligation under the garb of its abysmal financial position [*Cl. Ex. 8, ¶6*]. It has asserted that the previous years were financially troublesome and it would not have survived in business, but for the stringent restructuring measures [*ibid.*]. Besides, the loss incurred due to the payment of tariff would deprive it of the opportunity to secure an extended credit line [*PO 2, ¶29*]. However, these conditions, being CLAIMANT's personal affairs, cannot be used to persuade the Tribunal to consider mere onerousness as an impediment.

143. In view of the above, the imposition of the 30% tariff is not beyond the ultimate limit of sacrifice and could have been avoided by CLAIMANT.

c. The imposition of the tariff did not result in CLAIMANT's present financial position

144. Pursuant to Art. 79(1) CISG, an impediment must necessarily be the exclusive cause of promisor's non-performance [*Flambouras, p.273; Tallon, p.583; Ishida, p.334; Schwenzer, Art. 79 ¶16; Brunner, p.399*], a fact that CLAIMANT failed to prove. Nonetheless, RESPONDENT submits that the tariff imposition falls short of this requirement. *First*, the Tribunal should note that the losses CLAIMANT suffered are primarily attributable to the high interest rate on loans taken for financing new stables [*PO 2, ¶29*]. These losses have profusely contributed to its dilapidated position. *Second,* CLAIMANT itself disclosed that it was forced towards continuous layoffs and organisational restructuring to salvage its market stature [*Cl. Ex. 8, ¶6*]. All these factors, independent of the Contract, have equally and materially aggravated the onerousness of performance [*Resp. Sub. ¶142*]. As a matter of fact, the imposition of the tariff was merely the straw that broke the camel's back. Hence, by no means can the tariffs be the sole reason for CLAIMANT's burdensome performance.

145. For the foregoing reasons, RESPONDENT requests the Tribunal to find that the present event does not fulfil the prerequisites of an impediment under Art. 79 CISG.

4. CISG DOES NOT PROVIDE FOR THE REQUESTED REMEDY OF ADAPTATION

146. As opposed to CLAIMANT's assertions, RESPONDENT submits that the CISG does not contemplate the remedy of adaptation for impediments that hinder performance. Conceiving adaptation under the CISG would be against the black letter law of Art. 79 CISG which only fathoms avoidance as a cure for impediments [*Flambouras, pp.279-80; Rimke, p.240; Tallon, p.592; Elcin, p.616*].

147. Moreover, contracts spanning over long periods substantially increase parties' desire to have a mechanism that would instil flexibility in the contract [*Masten, p.1085*]. Thus, adaptation fits as an acute remedy only for long-term contracts [*Resp. Sub. ¶42*]. By contrast, the CISG governs contracts for sale of goods which by their very nature are short-term [*Frignani, p.350; Zaccaria, p.165*]. *Ergo*, adaptation cannot be an appropriate tool to remedy events under Art. 79 CISG [*ibid.*].

Thus, adaptation as a relief would be ill- suited for contracts under the CISG.

148. CLAIMANT cannot rely upon CISG AC Opinion No. 7 to demand adaptation under Art. 79 CISG [*Cl. Memo, ¶116*]. The CISG AC has suggested exercising any further relief customized for hardship, provided it is consistent with the principles underlying the CISG [*CISG-AC Opinion No. 7, ¶3.2*]. For the same, it has arbitrarily replaced the conformity requirement under Art. 7(2) CISG with a liberal consistency standard [*Lookofsky II, p.162*]. Yet, this relaxation cannot aid in reading adaptation into the CISG as it is inconsistent with the fundamental principle of party autonomy underlying the CISG [*Ferrario, p.158*].

149. CLAIMANT relies upon Art. 50 CISG to recognize adaptation as a general principle [*Cl. Memo, ¶119*]. RESPONDENT submits that the same is untenable as Art. 50 and Art. 79 CISG are at variance in several aspects. *First,* the former regulates defective performance while the latter governs non-performance. *Second*, the source of disequilibrium in both articles is different. Under Art. 50 CISG, the disequilibrium is an effect of the seller's defective performance. Whereas under Art. 79 CISG, the disequilibrium is caused by a supervening event beyond the control of the parties.

150. In sum, CLAIMANT is not entitled to an increase in the contractual price under Art. 79 CISG.

B. CLAIMANT IS NOT EXCUSED FROM LIABILITY UNDER THE UPICC UNDER ART. 7(2) CISG

151. Without prejudice to the aforementioned submission, RESPONDENT asserts that the UPICC is not applicable to the dispute pursuant to Art. 7(2) CISG **(1)**. Alternatively, if the UPICC were to be applied, CLAIMANT is not excused under the hardship exemption as the requirements under Art. 6.2.2 UPICC are not fulfilled **(2)**. Finally, CLAIMANT is not entitled to an adaptation of price under Art. 6.2.3 UPICC **(3)**.

1. UPICC IS NOT APPLICABLE TO THE PRESENT DISPUTE

152. CLAIMANT asserts that a gap in Art. 79 CISG is filled by resorting to the UPICC pursuant to Art. 7(2) CISG [*Cl. Memo, ¶122*]. *Per contra*, RESPONDENT submits that recourse to the UPICC hardship provision to '*gap-fill*' Art. 79 CISG would be ill-suited.

153. Contrary to Claimant's assertions [*Cl. Memo, ¶¶ 122, 124*], Respondent submits that the Tribunal should not rely on the UPICC hardship provisions either as underlying principles or as part of the Mediterranean law. A mere lack of reference to hardship by the CISG does not imply that the matter is unsettled under the CISG [*Ziegel, §4*]. A perusal of the drafting history [*Povrzenic, §3A*] reveals that the Working Group rejected the inclusion of a hardship provision [*Carlsen, p.1998; Flambouras II, ¶3; Rimke, §B2; Ziegel, §1C*]. This outright dismissal marked the dispositive settlement of the hardship issue and indicated the absence of any gap regarding the same [*Flambouras, p.278*]. Therefore, any antithetical conclusion would go against the intention of the drafters.

154. Besides, the UPICC hardship provision is not a general principle of the CISG [*Slater, p.250; ICC*

8873; ICC 9029]. There is no empirical study to depict that the UPICC is a trade custom or a usage accepted internationally [*Silveira, p.338*]. More significantly, it is widely acknowledged that Art. 6.2.2 UPICC was drafted to emulate the civil law concept of hardship which allowed for renegotiation and adaptation of contracts [*Flechtner, p.97; Tian Dai, p.131*]. Construing hardship within Art. 79 CISG through the UPICC would implicate imposing a remedy exclusive to one legal system on other states which never consented to it [*Klepac, pp.40-41*]. Thus, reliance on the UPICC hardship provision would be a flagrant disregard to the CISG's international character.

155. For the foregoing reasons, the UPICC is not applicable to the present dispute.

2. THE IMPOSITION OF THE TARIFF IS NOT A HARDSHIP UNDER ART. 6.2.2 UPICC

156. As opposed to CLAIMANT's contentions [*Cl. Memo, ¶138*], the imposition fails to conform to the requisites laid down by Art. 6.2.2 UPICC. This provision mandates a fundamental alteration of the contractual equilibrium for an event to be termed as hardship [*Art. 6.2.2 UPICC*]. For the same, the event must substantially increase the cost of performance for one party [*ibid.*]. Here, CLAIMANT contends that an increase in the purchase price by 30% has fundamentally altered the equilibrium of the Contract [*Cl. Memo, ¶137*]. However, RESPONDENT submits to the contrary. Commentators on the UPICC have adopted an objective standard prescribing a threshold of 50% [*UPICC Official Commentary, p.147*]. In addition, they have firmly suggested that any alteration below this limit must not be regarded as a fundamental alteration [*Girsberger, pp.127-28*].

157. The present imposition disturbed the equilibrium of the overall contract by 15%. The following calculations elucidate the aforementioned:

$$\text{30\% on the last shipment} = \text{30\% of USD } 5{,}000{,}000 = \text{USD } 1{,}500{,}000$$

$$\text{Effect on the whole Contract} = \frac{\text{Customs Tariff}}{\text{Purchase Price}} * 100 = \frac{\text{USD } 1{,}500{,}000}{\text{USD } 10{,}000{,}000} * 100 = 15\%$$

158. This alteration falls severely short of the 50% threshold. In fact, increase in costs by 13%, 30%, 44% or 50% have been deemed inadequate to fundamentally alter the equilibrium of the contract [*Brunner, p.427*]. Thus, the present modification of 15% falls below the stipulated threshold.

159. Alternatively, a fundamental alteration is tantamount to excessively onerous performance [*Vogenauer, pp.719-20*]. Since the 30% tariff does not render the performance excessively onerous [*Resp. Sub. ¶140*], it does not satisfy the requirement of fundamental alteration under Art. 6.2.2 UPICC.

160. Additionally, CLAIMANT could have argued that in light of its alleged financial ruin, the threshold to determine fundamental alteration should be lowered. *Au contraire*, RESPONDENT submits that a

lowered threshold is not justified as CLAIMANT is not on the verge of financial ruin following the imposition. The financial destruction of the promisor's particular business unit should not be an excuse to justify the claim for hardship, if other business units it operates are intact [*Brunner, pp. 437-38*]. In the instant case, CLAIMANT's racehorse section was not the only segment of the oldest and most acclaimed stud farm that it operated in Mediterraneo [*No A, ¶1*]. Rather, it covered all areas of the equestrian sport [*ibid.*]. It held huge assets in terms of 300 horses, including few of the most sought-after stallions for breeding. It even had its own mare herd, stallion and offspring depot [*ibid.*]. Over and above, CLAIMANT offered frozen semen of its champion stallions in other areas of horse sports [*No A, ¶2*]. Consequently, CLAIMANT had numerous cash cows against only one loss making entity which was the racehorse department [*PO 2, ¶15*]. In light of the above, the tariff imposition does not fundamentally alter the contractual equilibrium.

161. Furthermore, Art. 6.2.2 UPICC contains additional standards which have not been satisfied. *First*, the imposition was foreseeable and could have been taken into account by CLAIMANT at the time of contract conclusion [*Resp. Sub. ¶¶133-138*]. *Second*, the risk of customs tariff was assumed by CLAIMANT itself [*Resp. Sub. ¶¶105-112*]. Even though the conditions provided in Art. 6.2.2 (a) and Art. 6.2.2 (c) have been satisfied, all the requirements listed under Art. 6.2.2 have not been fulfilled cumulatively.

162. For the foregoing reasons, the imposition did not constitute hardship under Art. 6.2.2 UPICC.

3. CONSEQUENTLY, CLAIMANT IS NOT ENTITLED TO ADAPTATION UNDER ART. 6.2.3

163. Assuming but not conceding that the event fulfilled the requirements under Art. 6.2.2 UPICC, CLAIMANT demands adaptation under Art. 6.2.3 UPICC [*Cl. Memo, ¶136*]. Contrarily, RESPONDENT submits that insertion of §12 into the Contract is a derogation from Art. 6.2.3 UPICC by virtue of Art. 1.5 UPICC. It is stated therein that parties may overwrite the provisions of UPICC by adopting tailor-made clauses in their contract [*Vogenauer, p.137*]. Hardship clauses, in particular, are drafted to provide specific solutions, which seldom imply adaptation by courts [*ICC Standards, p.14*]. In the present case, §12 stipulated exemption of seller's responsibility from listed events as a specific remedy. The inclusion of this solution amounted to a derogation from Art. 6.2.3 UPICC. Thus, the '*picking of raisins*' by the Parties precludes adaptation.

164. *In arguendo*, RESPONDENT submits that it fulfilled the duty to renegotiate entailed by Art. 6.2.3 UPICC. On CLAIMANT's request, RESPONDENT scheduled a meeting on 12 February 2018 to re-negotiate the Contract [*PO 2, ¶35*]. Yet, CLAIMANT contends that RESPONDENT disregarded this duty by breaking the negotiations [*Cl. Ex. 8, ¶9*]. However, the failure of the Parties to reach an agreement, [*Vogenauer, p.723*] cannot be inferred as RESPONDENT's non-compliance with the duty to re-negotiate under Art. 6.2.3 UPICC.

165. Furthermore, a tribunal resorts to the remedy of adaptation only when it deems it *reasonable* [*ibid., p.724*]. The test for reasonability considers, among other things, the circumstances surrounding the contract [*ibid.*] which facilitates adaptation by arbitrators to the future needs of cooperation [*Horn, p.181*]. Consequently, any modification of contractual equilibrium must relate to future commitments or ones yet to be performed [*Vogenauer, p.718*]. Here, CLAIMANT has complied with its contractual obligations [*Cl. Ex. 5, ¶8; Cl. Memo, ¶120*]. Thus, it cannot invoke the remedy of adaptation against the obligation which has already been performed [*Vogenauer, p.718*].

166. Moreover, CLAIMANT could have argued that RESPONDENT unjustly benefitted from the resale of semen. Consequently, this wrongful enrichment would be considered while determining whether the Tribunal should order an adaptation. However, RESPONDENT submits that the Contract does not prohibit resale. In fact, it permits use of semen for other mares after '*information of the seller*' [*Cl. Ex. 5*]. It merely imposes a duty upon RESPONDENT to inform CLAIMANT about the use of every dose. Pursuant to Art. 8 CISG, a contractual term should be construed as per its literal meaning [*Bricks Repair case*]. Since the Contract unambiguously conveyed the notice requirement, its interpretation should not go beyond the wording of the Contract [*Schwenzer, Art. 8 ¶13*].

167. Besides, RESPONDENT would have never agreed to such a stringent resale prohibition. Under the Contract, RESPONDENT was to receive 100 doses of horse semen, to be used for three mares only [*Cl. Ex. 5*]. Notably, it is common knowledge that a mare has a gestation period of 11-12 months. This means that RESPONDENT would have to use the semen for 33 years if it were to limit the usage of semen to the mares specified. Considering the fact that the risk of usability of semen lied with RESPONDENT, it would not have waited for 33 years to finish the stock. Therefore, any reasonable man will conclude that the semen would have to be used for mares other than those mentioned in the Contract.

168. To conclude our submission, CLAIMANT is not entitled to adaptation under Art. 6.2.3 UPICC.

***

CLAIMANT is not entitled to additional remuneration in the amount of USD 1,250,000 resulting from adaptation of price either under §12 of the Contract or under the CISG.

PRAYER FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully requests the Tribunal to find that:

1. It does not have the jurisdiction and powers to adapt the Contract.
2. CLAIMANT is not entitled to submit evidence from the other arbitration.
3. CLAIMANT is not entitled to the payment of an additional amount of USD 1,250,000.
4. CLAIMANT should bear all the costs arising from these arbitration proceedings.

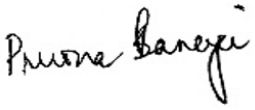
CERTIFICATE

We hereby confirm that this memorandum was written only by undersigned. We also confirm that we did not receive any assistance during the writing process from any persons who is not a member of this team.

24 January 2019

ASTHA AHUJA

MANASVINI VYAS



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